No. 2371

IN THE

# United States Circuit Court of Appeals

## Ninth District

CHRISTIAN HERRMANN,
Appellant

vs.

JOHN F. HALL, et al,
Appellees

Appeal from the District Court of the United States for the District of Oregon.

# Brief of Appellees

C. R. PECK,
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IN THE

# United States Circuit Court of Appeals

## Ninth District

CHRISTIAN HERRMANN,
Appellant,

vs.

JOHN F. HALL, MARY HALL, his wife, L. D. SMITH, ROSA M. SMITH, his wife, HENRY SENGSTACKEN, AGNES R. SENGSTACKEN, his wife, Z. T. SIGLIN, J. J. CLINKENBEARD, PHILURA CLINKENBEARD, his wife, S. C. ROGERS, DELIA M. ROGERS, his wife, D. L. ROOD, ELLA M. ROOD, his wife, JAMES T. HALL, ALICE HALL, his wife, WILLIAM O. CHRISTENSEN, MATTIE CHRISTENSEN, his wife, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation, trustee, TITLE GUARANTEE AND ABSTRACT COMPANY, a corporation,

# Brief of Appellees

East Marshfield Land Company, a corporation, Eastside Land Company, a corporation, Andrew Masters, Charles H. Curtis, Anna Johansen, John Wall, Mary Pennock, Arthur B. Sandohl, W. R. Haines, and Louis B. Haines, Harvey Smith, George Clinkenbeard, Anna D. Clinkenbeard, Chapman L. Pennock, Arne P. Husby, A. E. Cavanaugh, M. A. McLaggen and Minnie McLaggen, First Trust and Savings Bank of Coos Bay, a corporation, J. W. Vingard, Mary A. Peterson, Doris L. Sengstacken, Victor Alto, L. Grayce Gould, Cornelius Woodruff, William L. Leaton, John F. Bane, A. W. Neal, A. R. Welch, William Vaughn, William H. Payne, Hilda Fredericksen, Elizabeth Schieffele, Anthony Stambuck, George H. Elliott, Nellie Chandler, T. V. Johnson, Lisi Alto, J. T. Herrett,

Appellees.

Appeal from the District Court of the United States for the District of Oregon.

## BRIEF OF APPELLEES.

### STATEMENT OF THE CASE

This is a suit instituted by Christian Herrmann, the Appellant herein, as the sole heir of his deceased wife, Dora Norman Herrmann, to recover certain lands in Coos County, Oregon, which are described in the evidence as the "Holcomb Claim" or the "Norman Tract."

This land was owned by Dora Norman who lived in the vicinity of the land until 1901 when she removed to Germany and thereafter in 1902 married the Appellant herein, Christian Herrmann.

Dora Norman Herrmann was a woman who looked after her business affairs to the minutest detail and was exceptionally shrewd in the conduct of her property. This is disclosed from a consideration of the correspondence between Dora Norman Herrmann and Defendant, John F. Hall, who was her attorney in fact in Marshfield, Oregon, and was her agent in charge of her property. It is hardly possible to understand this case thoroughly unless the correspondence between Mrs. Herrmann and Mr. Hall is considered carefully. (T., P. 184 to 226, and 90 to 115.)

Mrs. Herrmann was very anxious to dispose of her lands in Oregon, including the lands in controversy, and again and again wrote to her agent, Defendant Hall, urging him to negotiate a sale for the property, fixing the price, and berating him for the fact that he had not theretofore been able to make a sale. The relation between the parties on this point is best shown by excerpts from the correspondence which bear upon the question in litigation; on January 1st, 1902, Mrs. Norman wrote to Defendant Hall: "Cannot you to sell some property of mine. I read in the paper that it is such a good time for selling land. Please try your best." (T., p. 190); again on June 22nd, 1902, she writes: "Can you sell any land for me? Please try what you can do. I like to sell everything out." (T., p. 188); again on August 15th, 1903, she writes: "I hope that in the course of the summer you will succeed in selling my hotel with the remainder of the lands. Please give me the exact information about everything, how the things are in my favor or to the contrary and if I may hope to succeed in selling all my property in your country there? Is there no chance that you can sell my lands on your own account without sending the deed here, if we can give you a general power of attorney, as our authorized representative?" (T., p. 201); which last letter is signed

by both Mrs. Herrmann and the Appellant herein; again on February 21st, 1904, Mrs. Herrmann wrote: "Please do try to sell something and do write. What is the reason that you do not get to sell anything? Is the price too high or is there anything else the matter? * * * * Besides do also let me know how it is that Holcomb's Claim, you never told me about it and I wish to know if Henry is still willing to take the land." (T., p. 204); to the last letter the defendant Hall replied on May 7th, 1904: "The Holcomb property, as we wrote you before, was sold under execution, and we bid it in again for you and the sale was confirmed at the last term of the Circuit Court, this last week, you will get a second deed for same in four months, then your title will be good. The Court allowed us $150.00 for attorney fees in the foreclosure proceedings. We have not taken anything out of your rent, but will wait a while, and see if we can sell the property." (T., p. 205); on May 12th, 1904, Dora Herrmann wrote to Defendant Hall: "Do write whether you did not sell any land or the house yet. We should like so much to know what is the reason that you did not sell anything, as you always promised to do so. Is the price too high? Or what is the reason? Do write about everything. How is it with the Holcomb's Claim? I read in the newspaper that the sale is

confirmed, but I never get any answer about that from you." (T., p. 207); to which last letter Defendant Hall replied on June 1st, 1904: "We could not sell your land, have done the best we could, the only people who are buying land are speculators. They want to get the land for nothing so as they can sell at a big price." (T., p. 208.) Again on July 7th, 1904, Defendant Hall wrote Mrs. Herrmann: "In regard to the Holcomb Claim the sale has been confirmed and you will get a new deed in the latter part of August. After this your title will be perfect. Times are pretty dull here at present, in fact there is no demand for property. We will do our best to make a sale." (T., p. 210); Again on August 3rd, 1904, Defendant Hall wrote as follows: "In the matter of the Holcomb Claim, as we wrote you before, the time for the Sheriff's deed will not expire until about the 27th of August. We have an offer of $3500.00 for the land provided the party that makes the offer can dispose of some property he owns in Portland. We told him we had your power of attorney, but would not make any promise concerning the price of the land until we heard from you. You will please let us know your lowest cash price for the land, also your lowest price one-half cash and one-half on time." T., p. 212); to which last letter Mrs. Herrmann, on August

29th, 1904, replied: "In the matter of the Holcomb Claim, I consent to sell it $4000, see what you get, if he does not agree with this, you could arrange the matter so that the 500 dollars are divided, he giving 250 dollars more and I only 3750 instead of 4000 dollars to receive. I hope that the deed for the claim will be all right." (T., p. 214). On November 17th, 1904, Mrs. Herrmann writes: "And did you get the deed from Holcomb? Please do take pains to sell something of my property, you always promise but that is all, and I should like it so much. * * * * And once more, do try as much as possible to sell something, you would oblige me so very much by it." (T., p. 216); to which letter, on January 28th, 1905, Mr. Hall replied: "We have the Holcomb matter so that we can get a Sheriff's deed at any time. * * * We are trying to sell the Holcomb land for four thousand dollars if that is satisfactory to you, but do not know whether or not we can do it. Times are pretty dull here just now, only the North Bend and Porter Mill running." (T., p. 217). To which last letter Mrs. Herrmann replied on April 13th, 1905: "I shall be contented if I get 4000 for the Holcomb place. * * * I hope that next time you will be able to give me very good news, that you have sold something, or that you have got the money." (T., p. 219); and in

reply Mr. Hall, under date of May 19th, 1905, wrote: "There is now considerable talk about land and we have a good prospect of selling the Holcomb tract for four thousand dollars." (T., p. 221); on June 12th, 1905, Mrs. Herrman replied: "I am also satisfied with the sale of the Holcomb land for 4000 dollars. You would really oblige me very much if you would apply to the affair very energetically, that now at length all my possessions there would be sold." (T., p. 222); to which Mr. Hall, on August 12th, 1905, wrote: "The Holcomb claim, I guess, is sold. The parties have agreed to take the same, and the abstract is now being made, and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September." (T., p. 92.) On August 31st, 1905, Mr. Hall wrote to Mrs. Herrmann as follows: "Enclosed herewith find check for the sum of $1694.00. We have sold the Holcomb land for $4000.00 net above commission, and our fee for foreclosing the mortgage. Have taken a mortgage for $2200.00, payable one year after date at six per cent per annum. Will take payments at any time for $100.00 and upwards.

We retain a sufficient sum to pay the taxes against that and all other property, together with the cost of abstract, and remit balance received herewith." (T., p. 90.)

The letter last above quoted was received by Mrs. Herrmann in Germany on the date of her death; to the last quoted letter, Christian Herrmann, the Apellant herein, replied, on November 8th, 1905: "I am very satisfied also concerning the Holcomb claim, that it has been sold. * * * * Please inform me which of the claims not yet sold belongs still to my wife's property, and at what price you think that you could get rid of them." (T., p. 94.)

From a consideration of the above correspondence it will be seen that Dora Norman Herrmann was very anxious to sell the property in question and that she was continually nagging the Defendant Hall to make a sale of the same, and chiding him for not doing so. It will also be observed that it was at her suggestion that the power of attorney was given to Defendant Hall, that she fixed the price of the property without suggestion from the Defendant Hall and that the Defendant Hall sold the same for her at a price which would net her the amount which she asked for the property, after deducting all expenses of the sale, together with an attorney's fee due Hall for the foreclosure of a mortgage on the property. If there had been any disposition on the part of the Defendant Hall to abuse the confidence of Mrs. Herrmann he could just as well have sold the property for

four thousand dollars including these expenses. And it might be well to remark at this time that a careful examination of the evidence in this case will disclose that the Defendant Hall has been a careful, considerate and pains-taking agent in connection with all the matters entrusted to him by Mrs. Herrmann. Defendant Hall, as the evidence shows, is fifty-six years of age, and County Judge of Coos County, Oregon, having held that office for nearly eight years, and prior to that time was County Surveyor for said County for four years; that he is an old-timer in Coos County and was acquainted with Dora Norman Herrmann from 1878 until the time she left for Germany.

At the outset this case should be distinguished from nearly every case which has been relied upon by Appellant as a precedent in this, to-wit: *There is no actual fraud in this case.* The lands were sold by Defendant Hall at the best price obtainable by him at the then reasonable market value. As the learned trial Court well said in his opinion in this case: "There is nothing in the record to support the charge of actual fraud made in the bill. On the contrary, the facts clearly show that the sale of the property in controversy by Hall, as attorney in fact for Mrs. Herrmann, was entered into by all the parties connected therewith in the utmost good faith. It

was made for four hundred dollars more than the price fixed by Mrs. Herrmann, and for its full market value at the time. * * * Numerous witnesses familiar with real estate values have testified that the property sold for the full market value, and this is apparent from the fact that Defendants Sengstacken and Smith contracted for its purchase in May, 1905, but hesitated to pay the entire purchase price, although amply able financially to do so, because it was considered a hazardous speculation. They therefore endeavored and promoted a syndicate to take the title and handle the property and it was only after considerable effort and the refusal of several speculators and dealers in real estate to join in the venture, that they were able to interest four of their neighbors and friends in the venture. If the property had been worth what the Appellant now claims it to have been, it is highly probable that Sengstacken and Smith would have readily taken the entire contract, or in any event they would have had difficulty in interesting others in the proposition. I take it, therefore, that question of actual fraud is out of the case and the only point is the legal effect of Defendant Hall's connection with the transaction." (T., P. 80.)

And to the above finding of the trial Court, no specific exception is taken on this appeal,

and the opinion of the Court in that regard and must be regarded as uncontroverted and undisputed. But by reason of the fact that the pleadings in this case and the brief of the Appellant contain so many suggestions of actual fraud, it is necessary to impress upon the Appellate Court the fact that the question of actual fraud is no longer in the case and we are dealing on this appeal only with the cold-blooded legal effect of the act of an agent honestly executed in behalf of his principal.

Appellant has gone into the evidence somewhat with reference to conditions existing after the date of the sale, but inasmuch as such conditions could only bear on the question of actual fraud, we must protest that the brief of counsel in that respect is irrelevant and immaterial.

The only facts and circumstances material upon this appeal are those which surround the actual consummation of the sale in determining exactly what was done or left undone by Defendant Hall, in order that we may ascertain the facts to which we would apply the law.

The trial Court found that the transaction was had and consummated exactly as claimed by Defendants and we would insist that by reason of the fact that the trial court had the opportunity of hearing the examination of the witnesses and noting their demeanor, that his opin-

ion is entitled to great weight upon this appeal; and it also might not be amiss to suggest a fact which is probably within the knowledge of this Court, that the learned Judge was formerly a State Circuit Judge with Coos County as part of his circuit, and by reason of his knowledge of local conditions, acquainted with the parties and their credibility, he was peculiarly qualified to try this case.

## THE EVIDENCE OF THE TRANSACTION

Defendant Henry Sengstacken gives in his own language the evidence of the manner in which the sale of the properties involved was entered into and consummated, and the same is as follows: "Q. Now relate in your manner, the circumstances and facts surrounding the initiation and consummation of this sale of the Norman tract to yourself and associates? A. Repeat that question please. (Question read.) I had, as I said before, the purchase in my mind for some time, on account of joining my Timberman tract, and I was told about this time, about the 17th of May, or just before that, that Mr. Buckman had made an offer for the tract; Mr. Buckman at that time lived at the East Side; that he had made an offer of $3500 for the Norman tract, $3500 cash, and I met Ren Smith in town one day. He and I had been do-

ing some business together before, and I suggested to him that we would go in together and take it in, perhaps he could take part of it. I am not sure if he agreed that day or not, but anyway very soon afterwards—he looked into it some—he agreed to go in with me, and we would take it. So he and I went up to Judge Hall's office, and ascertained what he would sell it for, on terms of half down and half on time. He said he would take $4400, so we agreed to take in on the terms of half cash and half in one year, interest six per cent; and we at that time gave him our joint note, payable ten days after date for $100, as part payment of the land. Q. Is Defendant's Exhibit BB that note? A. Yes sir, that is the note. Q. Did you make out that note? A. I made that note out. Q. And did you put the endorsement across the face here, 'Paid by purchase of land. Mrs. Dora Norman.'? A. I did that when it was redeemed, yes. Q. On August 30, 1905, did you make that endorsement? A. Yes, when I got the note back. I don't know the exact date. Q. Did you cut the signature off that date? A. I did. That is the way I generally cancel my notes; cut the name off. Q. Whose names were signed to that note before you cut them off? A. Henry Sengstacken and L. D. Smith. Q. Now, proceed with your testimony. A. When we paid him the

note, my recollection is that we took a receipt for $100 on account, describing the land and the terms, and subsequent to that we proceeded to interest other people in the deal. I believe we had some little understanding as to who we would take in, that is, take in people that would be agreeable, and people that could afford to buy and pay for it. So we made up, I think, a little list of whom we would see. I think, amongst others, I saw Stephen Rogers, E. A. Anderson, Taylor Siglin, D. L. Rood; Taylor Siglin refused to go in. So did Mr. Anderson. But Mr. Rogers, after considering it, agreed to take a one-sixth interest, and D. L. Rood agreed to take a one-twelfth interest. I think that Mr. Smith arranged with Mr. Clinkenbeard for his interest, I think he did the talking to him. Shortly after this first transaction at Hall's office, that I speak of, Mr. John F. Hall went to the city, I believe. He was gone some four or six weeks, I don't know exactly as to the time, but about that time, and when he came back, I went to him with a view of closing the deal. I am not positive if he had secured the abstract at that time or not. I believe he had to order it from Mr. Hacker, who was then making abstracts, but I believe the abstract was held up waiting for a Sheriff's deed, which had not been recorded, and was not recorded until the 26th of Au-

gust, 1905,—24th of August, 1905. Then after that was recorded, the title was passed upon by my attorney, who was Mr. C. A. Sehlbrede, and the day for making final payment was then set for August 30, 1905. On the morning of August 30, 1905, when the Coos River boats came down, which arrived in Marshfield about ten o'clock, I saw—I should have stated there before, that among those I saw were Herbert Rogers, who also agreed to take a one-twelfth interest. And this morning of the 30th of August, 1905, when the boat arrived, on which Herbert Rogers was working, he informed me that he had changed his mind about taking his one-twelfth interest; that he didn't consider it an extra investment, or words to that effect. I believe that Mr. Stephen Rogers, his father, came down that morning, and so did Mr. J. J. Clinkenbeard, and I expected that morning that they would come to my office; that is, to make payment in there, but found out afterwards that they had gone direct to Mr. Hall's office and paid their money in to Mr. Hall. L. D. Smith paid the amount of his three-twelfths in to me. I think it was in checks on Flanagan & Bennett Bank, and D. L. Rood gave me his check for his one-twelfth interest. and I went up to Hall's office, and told Mr. Hall that all the men who had agreed to take an interest with us were here, but that Herbert

Rogers had backed out, and would not take his interest. I says to Hall: 'What's the matter with you taking his interest? You are getting a commission out of this for selling this land, and you might as well take this interest to close it up.' He replied that he didn't know, and would talk it over with Tom. And I paid in to Mr. Hall the amount of my three-twelfths, Mr. Rood's one-twelfth, and Mr. L. D. Smith's three-twelfths, and I believe the matter was left open until the next morning to decide whether or not Hall would take the interest. I believe that he remarked that if he didn't want to take the interest, that he would trust me for the other part due on the payment. The next morning I saw Hall again, and he said that he had talked it over with Tom, and that they had concluded they would take the interest. Q. Did the deeds pass at that time, and the mortgage? A. Yes, sir. Q. Now, what was done with the title to the property, and when was that agreed upon? A. It was agreed upon beforehand that the title should be put in the name of the Title Guarantee & Abstract Company, Trustee, in order to avoid the trouble in transferring—in case any of the parties in the venture should die, it wouldn't tie the property up, so we concluded it would be easier to handle it in that way by putting it in the Title Guarantee & Abstract Company, as

trustee for the parties interested. Q. Where is the receipt which was given you by John F. Hall on May 17, 1905? A. I don't know. I have been looking for it, but I have been unable to find it. Since that transaction, I have moved my office three times. The last time I moved from the Flanagan & Bennett Building; considerable of my old papers were in the back room and rained upon, and in moving into the new quarters where I now am, I destroyed considerable of my old records, which I thought were past age, and I had no further use for, and some without overhauling, and it is possible it may have been destroyed, and it is possible I may have it yet among my papers. At any rate, I haven't been able to locate it. Q. Have you made a careful search for it? A. I made quite a search. Q. Did you consider that receipt of any value after you got your deed? A. No, I didn't consider it of any value. I thought the proposition was closed. Q. What became of the title of the property in later years? A. We afterward platted a portion of it into lots, and I also platted a portion of my own property that I got from Timberman in the same plat, called East Side. The plat was produced here in evidence, and later we platted another forty, called the Home Addition to East Side in larger lots. We thought they might sell to the mill employes

over there, but they didn't go so very fast after all, and in selling some of these lots in the East Side, we run against objection the way the title stood, that is, this Trustee title business was not considered very satisfactory at the best, and to overcome that, and bring everything clear into the proper owners, we concluded that we would incorporate and have everybody who had ever had anything to do with the land, deed into this corporation incorporated in the name of the East Side Land Company. Q. And does that company hold the property at the present time? A. They hold the property now. Q. And among whom is the stock divided? A. I own 50 per cent, or one half—six-twelfths, and L. D. Smith five-twelfths, and Z. T. Siglin one-twelfth, or in other words, the stock—we incorporated for $9600 at $10 a share. Consequently L. D. Smith had 400 shares, Z. T. Siglin 80 shares and my proportion was 480 shares of it. I subscribed for 478 shares, I believe, my wife one share, and Mr. Street, at that time my secretary, one share, making the amount." (Trans. pp. 307-313.)

The evidence of Henry Sengstacken, above set forth, is corroborated by the testimony of John F. Hall, L. D. Smith, and each of the other parties interested in the original purchase of the land in controversy. There is no evidence to the

contrary. The only evidence which Appellant claims is to the contrary is the evidence of the letter of John F. Hall of May 19, 1905, wherein Defendant Hall in writing to Mrs. Herrmann says: "There is considerable talk about land, and we have a good prospect of selling the Holcomb tract for $4000." (Trans., p. 221)

Appellant claims that this letter written on May 19th, shows that there was no sale made on May 17th.

But this letter is explained by Defendant Hall as follows: Q. I hand you defendant's Exhibit Y, your letter to Dora Herrmann, in which you said: 'there is now considerable talk about land and we have a good prospect of selling the Holcomb tract for $4000,' and ask if you have any explanation to make of that statement in view of your testimony that the sale was actually made on May 17th? A. I had not received any money other than the note introduced here, and I didn't wish to lead her to think that the sale was completed until I got the money in my hands. She was very peculiar. You will notice by some other letters here, when I would write telling her I was negotiating with certain persons or thought I had a sale, and it fell through for any reason, she was always writing asking why I didn't complete it, and while I considered the sale was made, yet at the same time it

was subject to title and subject to examination, and I thought I would wait until I got the money before I said anything about having completed it." (Trans., p. 245); and in cross examination: "Now why did you not write her that you had entered into a contract for sale of the land? A. Well, I don't know, I did not think it was necessary. That is one reason and another reason was that if I wrote her, as I did, you will notice on two or three other occasions, telling her I was dealing with certain individuals on that property, and it fell through anyway, she would be writing back, the old lady would be worrying about it. She worried a great deal about it." (Trans., p. 251.)

The trial court found that the sale was entered into, and consummated exactly as Appellees claim, as shown by his opinion, at pages 80 and 86 of the transcript herein.

The original equitable purchasers were Henry Sengstacken, L. D. Smith, S. C. Rogers, J. J. Clinkenbeard, D. L. Rood and Herbert Rogers. On the question as to whether these parties were bona fide purchasers in this transaction, the uncontradicted evidence of each will show as follows:

L. D. Smith testifies that he understood that Herbert Rogers was to take the one-twelfth interest, which ultimately was purchased by John

F. Hall and J. T. Hall, and that on August 30th he paid for his interest in the property without any notice that either of the Halls were to have any interest in the property. Examination of L. D. Smith: "Q. Well, my question was, how soon after that time did you learn that Hall & Hall, or John Hall had taken an interest in the property? A. The next time I came to town, Mr. Sengstacken told me. He says: 'By the way, Mr. Rogers fell down right at the last minute—Herbert Rogers.' He was the one that Mr. Sengstacken had solicited to go in, and he says, 'right at the last minute he fell down," he says. 'And I got,' he says, 'Johnnie Hall or Hall & Hall, to take his interest.' Q. At that time you paid your money in, or at any time before that time, did you have any idea, or suspicion that John Hall, his brother, or Hall & Hall, was to take or acquire any interest in this property? A. Of course not. It was never talked of, although we all met, and I didn't think of anybody else. Rogers was to take that—Herbert Rogers was to take that interest, agreed to take it. Q. What was the amount of your interest? A. My interest? Q. How many twelfths?. A. Three-twelfth. Q. Do you still retain that interest? A. Yes, sir. Q. Have you acquired any additional interest? A. Yes, sir. Q. In the property? A. Yes, sir. Q. Who from, and when?

A. I acquired the interest of J. J. Clinkenbeard." (Trans., pp. 278-279.)

S. C. Rogers testifies "that at the time he paid his share of the money to John F. Hall he saw the deed; that Mr. Hall had the deed; that it was read to him at that time—that Defendant Clinkenbeard was present during this time, and that he encouraged Clinkenbeard in taking an interest; that the deed was read to him, and he paid his money; that he thought upon his payment of the money and acceptance of the deed that closed the bargain; that at the time he did not know that John F. Hall or Hall & Hall were to take an interest in the deed; that he did not have any suspicion that John F. Hall or Hall & Hall were to acquire any interest under the deed at that time, but that they were doing the work for another party, and were getting others to take stock." (Trans., p. 337.) "Q. How long after did you find out Hall & Hall had acquired any interest in this property? A. Oh, I should think a month." (Trans., p. 338.)

It is admitted that the Rogers interest was a two-twelfths interest, and was subsequently acquired by Defendant Sengstacken.

J. J. Clinkenbeard testifies: "Q. Now, when you finally paid your money in, state the circumstances surrounding the paying of your money for your share. A. The money was all

to become due on a certain day; I would not attempt to testify as to the day; the day the money was to become due Mr. S. C. Rogers and myself went into the office of Judge Hall, and we each made out a check for one-half of the amount that he was to pay for the land, and we called for the papers, deeds, etc., which we looked over, and after we had done so, we paid our proportion. I disremember the exact amount, but one-half of the purchase price of the land. Q. One-half of your part of the purchase price? A. Mr. Rogers paid his proportion at the same time; we paid this money to Judge Hall. Q. Did you see the deed to the property at that time? A. Yes, sir. Mr. Rogers and me looked it over. Q. Was it then signed and executed by Mr. Hall? A. We considered it properly signed; we were satisfied with it. Q. At that time, who were the other parties whom you understood were to take an interest in this purchase? A. There was Mr. Henry Sengstacken, and Mr. L. D. Smith, in fact, they were the ones that were soliciting subscribers for the funds to buy this property, and D. L. Rood, H. H. Rogers, and S. C. Rogers, and myself is all that I can call to mind at this moment. Q. At the time you made the purchase and paid your money in to John F. Hall, did you have any knowledge or notice that John F. Hall or Hall & Hall were to acquire any

interest in the Norman tract by virtue of that transaction? A. No, I didn't. Q. How long afterwards was it before you first discovered that John F. Hall or Hall & Hall had acquired any interest in the Norman tract? A. I could not say about that, it was some time afterward, I don't know, it might have been a month, and it might have been six months. I don't remember the time. Q. At the time you paid your money in, had you any suspicion or intimation that John F. Hall or Hall & Hall were to obtain any interest in the Norman tract by virtue of that sale? A. No, sir. I did not. Q. At that time, had any other persons than the persons you have mentioned, been suggested as purchasers under this deed, by either Mr. Sengstacken or Mr. Smith? A. Not that I remember. Q. How much later did you sell your interest? A. I don't remember, I suppose a year and a half, or such a matter after we bought the property. Q. To whom did you it sell it to? A. L. D. Smith." (Trans., pp. 356-7-8.)

D. L. Rood testifies as follows: "Q. Are you the D. L. Rood who, in 1905, was interested in the purchase of a tract of land known as the Norman tract from Christian Herrmann and Dora Herrmann, through John F. Hall, their attorney in fact? A. Herrmann, not known by that name; yes, I am. Q. State the circum-

stances under which you became interested in that purchase? A. Why, Mr. Sengstacken and Ren Smith were the ones that I understood purchased the property, and they come to me and wanted to know if I wanted to go in on the ground floor with them, and I told them that I would. Q. How much of an interest did you agree to take? A. One-twelfth. Q. Who were the other persons whom you understood at that time were interested in the purchase of this tract? A. Why, S. C. Rogers, and J. J. Clinkenbeard, and the young Rogers, Stephen's son, Herbert Rogers; I don't know as I remember all that was in it. Q. Did you understand that Mr. Sengstacken and Mr. Smith were retaining an interest also? A. Yes, sir. Q. Who did you pay your money in to? A. Why, if I remember correctly, I paid mine over to Henry Sengstacken; I would not want to swear to that but as near as my recollection is now, I paid it over to him. Q. Do you remember the date? A. If I could find some old checks; I think it was in August. If I remember I know I gave a check for it. I think it was in August, but I don't know; would not try to tell the date as far as that, but I think it was the month of August. Q. At the time you paid your money in on the interest that you were purchasing, did you have any notice or knowledge of any other persons

being interested in this purchase than the ones you have mentioned? A. Why they were all mentioned, but I have forgotten who they were; they were told to me, but really I have forgotten who they were. Q. Did you have any knowledge at the time you paid this money in that John F. Hall or the firm of Hall & Hall were interested in any way in this purchase? A. Not as purchasers; I understood Hall was the agent, or something like that, for it. Q. Did you have any suspicion or intimation that John F. Hall or Hall & Hall were going to acquire any interest in this property? A. No sir. Q. When was it that you first learned that Hall & Hall or John F. Hall had acquired any interest in the property. A. Why, I think they told me up in their office some time after that; I could not say how long. I think, if I remember, Tom, as we call him, said that they had an interest in it. Q. At the time of the sale, whom did you understand had agreed to take the interest which afterwards developed that Hall & Hall had taken? A. Young Rogers I understood backed out; that is, Herbert Rogers." (Trans., pp. 369, 370, 371.

Herbert Rogers testifies that he had agreed to take a one-twelfth interest in the property, but that on the day he was supposed to pay his money in, August 30, 1905, he told Mr. Seng-

stacken that he had decided to back out of the bargain. Trans., p. 348-9.

This interest of Herbert Rogers was the interest which was taken over by John F. Hall and J. T. Hall under the circumstances disclosed by the testimony of Henry Sengstacken above set forth. And in respect to the acquisition of the Rogers interest by John F. Hall and J. T. Hall, John F. Hall testifies as follows: Q. Now when did you first hear anything about any syndicate being formed by Mr. Sengstacken and Mr. Smith, as alleged in the answer in this case? A. Well, now, I don't remember the date, but I think it was in July. Q. What did you hear about that? What was the understanding in that regard? A. Well, I was talking to Mr. Sengstacken about it, and he said he was going to get some other parties in with him and was going to form a syndicate and take it together, and that—I think it was in July, and later on he told me that he had—it was all taken up—all the shares were taken up, and on the date, that is, the 30th of August, Mr. Rogers came in and paid me—. Q. Which Rogers? A. S. C. Rogers, we generally call him Stephen Rogers. He came into the office and paid me three hundred and sixty-six dollars and some cents, and at the same time, Mr. Clinkenbeard came in and paid a like amount, and later Mr.

Sengstacken came in and he said that one of the parties that was to take an interest in the property had gone back, and wanted me to take an interest in it. Q. Did he say who that was? A. Well, I am not sure now. My brother was there; he says he said it was Herbert Rogers, but I have no recollection whether it was Herbert Rogers or not, but he said one party went back, and he wanted me to take an interest in it. Q. Did Mr. Sengstacken pay any money in at that time? A. He did, he gave me a check. Q. How much did he pay at that time? Will you refer to your books of that date? A. Clinkenbeard paid $366.65; Rogers $366.65; Sengstacken the total amount he paid was $1466.70. He didn't give me all that money, but that is what we gave him credit for, and the check was for some five hundred and some odd dollars, and I had him to make up the rest the next day. Q. Did he have some money for Smith—did he pay money for Smith and Rood? A. He paid for others, I don't know who the other parties were. In my book I made it 'others'. I didn't know who the other parties were at the time. Q. And that was the reason you credited it in your book as 'others'? A. Yes sir. Q. Because you didn't know the other parties?. A. I didn't know who they were. Mr. Sengstacken had told me probably two or three days before,

I don't know just how many, that the parties buying the property—that the title was to be made to the Title Guaranty & Abstract Company and I didn't know who the other parties were that were purchasing, other than Mr. Smith; that is, I didn't know Mr. Rogers was in it until he came in to make a payment. Q. I will ask you to examine Plaintiff's Exhibit 16, and state if that is a correct copy of the book item which you made and entered as of that month, at the time of the transaction?. A. Yes sir, that is a copy of the book—copied right from the book. Q. What did you tell Mr. Sengstacken when he suggested that you take this Rogers interest? A. I told him that I did not think I could do it. My brother was interested in it or in the fee. Mr. Sengstacken figured that our commission would come out of it, and it wouldn't cost us anything. I said I couldn't agree to do that until I consulted Tom, because I didn't know whether he would stand it or not. He had been hurrying me up, in fact had objected to my sending the rent, when she was owing us for the foreclosure suit, and I told him I would let him know the next morning. I thought probably I would do it. The next morning he came in and I told him—I talked it over with Tom the night before—and I told him we would take this share. Q. When with refer-

ence to this conversation with Mr. Sengstacken, did you execute the deed? Well, the deed was delivered on the 30th. I don't know whether we wrote it on that day, or whether we wrote it before. The deed would show the date, but I think the deed was executed on the 30th. Q. Do you remember whether or not it was executed at the time Rogers and Clinkenbeard paid their money in? A. The deed had been executed at that time, yes. Q. Do you remember reading it to Clinkenbeard and Rogers? Or anything of that kind? Do you remember if they examined it? A. No, they didn't examine it, they just asked if it was made out. Q. Now did you take this interest in this property? A. Took an interest, yes. Q. Why? A. Well, after talking it over with Sengstacken that night, and with my brother the next day, why, we didn't want to hang the matter up. Of course if they didn't pay the money then, we would have to commence a suit to enforce it, and we didn't have to pay out any money; in fact there was a little coming to us after paying the interest we would take, and I told my brother we would take it." Trans., p. 235-6-7-8. And on cross examination John F. Hall further testifies: "Q. Now, you say that the reason you took this one-twelfth interest at that time was to keep the deal from falling through? A.

No. I don't say that. I said that it probably would delay matters. Q. Delay matters? A. Yes. Q. Well, what was it that Sengstacken told you about the deal falling through? A. He said one of his men went back on the deal, or went back on him or words to that effect. Q. But you didn't seriously consider the deal would fall through on account of a lack of $183? A. Didn't think it would fall through, but thought it might delay matters, and the old lady was wanting money, and I was trying to hurry the money there to her." Trans. 265-6-7.

The evidence shows without contradiction that the original interests in said property are now held as follows: Defendant Sengstacken holds his own original interest of three-twelfths, together with the two-twelfths interest of S. C. Rogers, together with the one-twelfth interest of Herbert Rogers, which was taken over by John F. Hall and J. T. Hall, each having a one-twenty-fourth interest—making in all a one-half interest; defendant L. D. Smith holds his original three-twelfths interest, together with the two-twelfths interest of J. J. Clinkenbeard; Defendant Z. T. Siglin holds the one-twelfth interest of D. L. Rood, which Rood sold to Sengstacken and which Sengstacken sold to Siglin; that these parties—Sengstacken Smith and Siglin—incorporated the East Side Land Company,

as a holding corporation to hold title to the properties involved in this litigation, and divided the stock among themselves upon the basis of their equitable ownership in the lands.

This venture of defendant Sengstacken and his associates turned out to be a very profitable one, and in the year following the purchase railroad construction work was started towards Coos Bay, Oregon, and as a result this property, together with all other property around Coos Bay increased in valuation by leaps and bounds.

The appellant testifies that he came to Marshfield in April, 1909, and the defendant Hall then treated him fairly, turned over his papers to him, and secured a German interpreter to explain any matters of which Mr. Hermann might desire an explanation. Shortly thereafter the appellant negotiated the note representing the balance due from defendants in the purchase of a ranch near Marshfield, and for which note he received a credit of its face value with interest.

For two years Mr. Hermann lived in the vicinity of this land in controversy and made no objection to the manner in which defendant Hall had executed his agency in reference thereto. But in 1911, for some unexplained reason, appellant demanded an accounting. The whole long and short of the matter is that Mr. Her-

mann had been disposing of his deceased wife's property and living on the proceeds thereof, and in 1911 he came to the point of dismal outlook, where it seemed that he might actually have to labor for a living, which was an unpleasant thought to his aristocratic German soul. And as he saw these defendants selling his wife's property as a townsite, which was purchased by these defendants on an acreage basis, he became embittered and sought some method to recover the same.

And now years after the sale of said property, which was made by defendant Hall in the best interests of his principals, this court of equity is asked to set aside said sale, not only as to the one-twenty-fourth interest therein taken over by said agent, Hall, but also as to the interest of other purchasers who were innocent purchasers for value with no suspicion that defendant Hall was in any way interested in their property.

## POINTS AND AUTHORITIES.

### I.

As to Purchase of Interest by Agent Hall.

When an honest, bona fide sale between an agent and a third party has been so far executed that the same is enforcible against the principal, the duty of the agent with reference to the making of the sale has terminated in every mat-

erial sense and thereafter the agent may properly become interested in the purchase by contract with the third party.

Robertson vs. Chapman, 152 U. S. 673,
Walker vs. Derby, 5 Biss. 134,
McGar vs. Adams, 65 Ala. 106,
Moore vs. Green, 3 B. Mon. (Ky) 407,
Smith vs. Tyler, 57 Mo. App. 668,
Bookwalter vs. Lansing, 23 Neb. 291, 36 N. W. 549.
Walker v. Carrington, 74 Ill. 446.
Rathe v. Tyler (Ia.) 111 N. W. 436,
Halperin v. Callender, 39 N. Y. S. 1044,
La Force v. Wash. Univ. 106 Mo. App. 517,
Beauchamp v. Higgins, 20 Mo. App. 514,
Morgan v. Aldrich (Mo.) 91 S. W. 1027.

Oregon has adopted the rule of conflict of interest. If it appears that the agent purchased when there was no conflict of interest between his own interest and that of his principal, then the sale should be upheld.

Marquam v. Ross, 47 Ore. 405.

II.

As to Statute of Frauds.

1. "Whatever form the agreement may assume, if the writing or writings, received as a whole, constitute in essence and substance upon their face a note or memorandum in writing,

subscribed by the party to be charged, showing who the contracting parties are, the subject matter of the sale and the consideration, the statute is satisfied." (citing cases.)

Flegel vs. Dowling 54 Ore. 49.

2. "For this purpose we think the testimony of Maguire is admissible to show the circumstances under which the two instruments were executed, and how the parties acted with reference to them after they were executed, and what they did with them, and it remains to be determined what is the effect of them when considered together. Several writings may be taken together to make a memoranda of a contract sufficient to satisfy the statute. (citing) Salmon Falls Mfg. Co. vs. Goddard, U. S. 446 et al."

Flegel vs. Dowling 54 Ore. 49.

3. A receipt is a written admission.

Thompson vs. Layman 42 N. W. 1061 (Minn.)

4. "The phrase 'terms of sale' means all the essential ingredients of the contract or transaction."

Platter vs. County of Elkhart (Ind.) 2 N. E. 555.

5. But when a contract is proved by oral testimony, the statute of frauds must be raised by objection or motion to strike, and if not so raised the defense is waived and cannot be raised

upon appeal.

Pike vs. Pike (V T) 38 Atl. 265,

Nunez vs. Morgan, 77 Cal. 427,

Marr vs. Burlington, 121 Iowa 117, 96 N. W. 716,

Royal Remedy etc. Co. vs. Gregory Grocery Co. 90 Mo. App. 53,

Eisley vs. Malchow, 9 Neb. 174, 2 N. W. 372,

Roe vs. Bridges, (Tex.) 31 S. W. 317.

6. "The question of the sufficiency of evidence must be raised by objection in the court below, and will not be considered if raised for the first time on appeal."

2 Cyc. 698, Note 48, Citing cases from many jurisdictions.

7. "If there is a failure to make all the proof which is required, it seems that the defect should be pointed out in the trial Court so that it may be supplied, an objection coming too late if first made in the appellate Court."

2 Cyc. 700, note 50.

III.

As to Proof of Receipt.

1. Proof of the loss of the receipt was addressed to discretion of trial Court.

Elliott on Evidence Vol. 2 Sec. 1456 with note citing cases from many jurisdictions.

2. If no objection as to competency of witness to testify is made at time of trial, the objection will be deemed to have been waived.

Eliott on Evidence Vol 2. Sec. 721 with note citing cases.

3. "Whether the evidence of the loss or destruction of a paper is sufficient to let in secondary evidence of its contents is a question addressed to the discretionary power of the presiding judge, and, in the absence of an apparent abuse of his authority, his decision is not revisable by this Court."

Camden vs. Belgrade (Me.) 3 Atl. 652.

4. "If we were in doubt as to the existence of this alleged contract, the finding of the court below should prevail. When the court below has considered conflicting evidence, and made its finding and decree thereon, it must be taken to be presumptively correct. Warren v. Burt, 12 U. S. App. 591,600, 7 C. C. A. 105, 110, and 58 Fed. 101,106; Paxson v. Brown, 27 U. S. App. 49, 10 C. C. A. 135,144, and 61 Fed. 874,-883; Stuart v. Hayden, 18 C. C. A. 618,72 Fed. 402, 408; Fitchett v. Blows, 74 Fed. 47; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 335; Evans v. Bank, 141 U. S. 107, 11 Sup. Ct. 885; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821."

McKinley vs. Williams, 74 Fed. 102.

5. It is sufficient if the substance of the lost receipt be proved.

2 Elliott on Evidence, Sec. 1476.

BRIEF OF ARGUMENT

The Appellant in this case seems to found his position upon the following proposition:

That Sengstacken and Smith could not transfer any interest in the lands in controversy to defendant Hall until the legal title to the lands had passed from appellant and his wife, and that if they did so, the whole transaction was thereby tainted with constructive fraud, and that this appellant is entitled to set the sale aside and recover the property upon a tender of the purchase price together with interest.

On the other hand, the appellees contend that if a sale had been so far consummated between Sengstacken and Smith and defendant Hall, as the agent of appellant and his wife, that the same could be enforced by Sengstacken and Smith, then, that, for the purpose of this case, the agency of Hall had terminated, and Sengstacken and Smith could thereafter properly sell any part of the lands involved herein to defendant John F. Hall.

The appellees would support their position by the case of Wing and Evans vs. Hartupee, 122 Fed. page 900, which is a case decided in 1903 by the United States Circuit Court of Appeals

of the Third Circuit. In that case Crouse and Hartupee were co-trustees of 200,000 shares of capital stock. Crouse made a bona fide sale of said stock to a third party by the name of Pitcarn. Pitcarn was unable to take over all of the stock at once by reason of the fact that the same was pledged as security for an obligation, and he could only receive the same as it might be released therefrom. After he had taken over some of the stock, he sold, by a bona fide sale, 50,000 shares of said stok to Hartupee, the co-trustee, and in the suit to set aside the last mentioned sale the Court held that until the legal title of the stock passed to Pitcarn he would be unable to make a valid sale to the trustee. The Court, in its opinion, admits that this is an extension of the ordinary rule and that it is an arbitrary rule which might not reach the equity of all cases. And furthermore in this contract the Court does not specifically find an enforcable contract.

On the other hand the appellees rely upon the case of Robertson vs. Chapman, 152 U. S. 673, decided in 1894. In this case a man by the name of Polk was agent of the plaintiff in the negotiations of the sale of certain property to a man by the name of O'Donohoe. O'Donohoe was unable to complete the payments under his contract of purchase and before the deed was delivered to O'Donohoe, and while the same was

in the hands of Polk to be delivered upon the payment of the balance of the purchase price of said land, Polk took over the O'Donohoe contract and completed title in himself. Robertson, the principal, thereafter attempted to set aside the transacion on the theory that Polk could not properly take title to the premises under the conditions before mentioned, and the Supreme Court, in passing on that question, says:

> "So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. Nothing then stood in the way either of O'Donohoe's agreeing that Polk should take the property, or of Polk's becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe. And his failure to give notice of his purchase im-

mediately upon its being made cannot be regarded as a fraud upon the rights of the plaintiff. A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained, without impairing, in any degree, the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale."

The last above mentioned case has never been criticised or over-ruled and stands today as the law on the subject. The Hartupee case, relied upon by appellant, does not cite or discuss the Robertson vs. Chapman case. Evidently it was not called to the attention of the Court. If the Supreme Court of the United States had wished to extend the rule as did the Circuit Court of Appeals in the Hartupee case, there was much more reason for doing so in the facts of the Robertson vs. Chapman case.

So the rule as laid down by the United States Supreme Court, in cases of this kind, is, that if

the sale has been so far consummated that it may be enforced by the third party against the agent and principal, then the agent has a right thereafter to, in a bona fide sale, acquire a valid interest in the subject matter of the sale from the vendee.

The question then remains, do the facts in this case bring us within that rule? We claim they do. The appellant claims that we are not within the rule for the reason that the sale by Hall to Sengstacken and Smith was not consummated so that it could be enforced by Sengstacken and Smith prior to the time of the taking of the interest by defendant Hall.

The evidence in this case shows, and the trial Court so found, that defendant Hall as agent for appellant and his wife, on May 17th, 1905, sold the property involved to defendants Sengstacken and Smith; that at that time Sengstacken and Smith gave him their joint note for one hundred dollars as part payment on the purchase price, which note is introduced in evidence as "Defendant's Exhibit BB," and that Hall then gave Sengstacken and Smith a receipt for said one hundred dollars specifying the terms of the sale and describing the property. The passing of this receipt and the note was a sufficient memoranda to satisfy the statute of frauds of the state of Oregon, which said statute is correctly

set out on page 59 of appellant's brief. Under the authority of Flegel vs. Dowling, 54th Or. 40, these two instruments may be construed together as a memoranda of sale. The note shows definitely who the contracting parties are, being payable to John F. Hall, and being signed by Henry Sengstacken and L. D. Smith. The receipt, as testified to by Mr. Sengstacken, contained the "terms" and described the property. Mr. Sengstacken states the terms were $4400.00, one-half cash and one-half in one year (T. p. 307.) Then (T. p. 308) he further testifies "That we paid him the note. My recollection is that we took a receipt for $100.00 on account, describing the land and the terms." Defendant Hall testifies (T. p. 231):

Q. Was there any written memorandum made at the time signed by yourself in the nature of a contract or receipt or otherwise, with reference to this transaction?

A. I made out a receipt for $100.00 on the purchase price of this particular tract of land.

It will be noted that this evidence of the receipt, both on the part of Sengstacken and Hall, was not objected to at the time of the trial nor was there any motion thereafter interposed to strike the same out, and now, for the first time, on appeal an objection is made that this is incompetent and insufficient to establish the con-

tents of said receipt. Under the authorities hereinbefore cited, the appellant cannot raise this question for the first time upon appeal and unless he objected at the time of the introduction of this testimony or moved to strike the same out, the insufficiency and incompetency thereof has been waived. And there is good reason in this rule, for it should not lie in the mouth of appellant, after having permitted the contents of this receipt to be proved in the manner above stated without objection, to now raise the question when it is impossible for the appellees to correct the proof. Had any suggestion been made at the time of the introduction of this testimony, as to its insufficiency, the witness could have been further interrogated and the contents of the receipt could have been more fully and definitely established. Or the appellant had the right of cross-examination, and before he could raise this question upon appeal for the first time he should at least be held to an attempt at correcting the objectionable features by cross-examination. In the heat of the trial many things are omitted which might more fully explain or identify, but when either party neglects to object to the insufficiency of the evidence offered, by objection or motion to strike, he is estopped thereafter to challenge such insufficiency for the first time upon appeal.

Appellant claims that there is no testimony which shows that John Hall signed this receipt; however, he does testify that he "made out a receipt for $100.00 on the purchase price of this particular tract of land." Under the authorities cited a receipt is defined as a written admission of the party making the same. Defendant Hall could not make a receipt without signing the same, or until the same was signed it would not be a receipt. Then,too, defendant Sengstacken testifies that "We (referring to himself and Defendant Smith) took from Hall a receipt." This testimony, in the absence of objection, can only be construed to mean an executed receipt.

Mr. Sengstacken testifies as to the terms of the sale and then states the terms were included within this receipt, which, in the absence of objection, is sufficient declaration of the contents of said receipt in that regard. Both Mr. Sengstacken and Defendant Hall state that said receipt particularly described the property. So considering the note, together with the receipt, we have all the elements of a sufficient memoranda under the Oregon statute, as construed by the Oregon courts, namely, the signature of the party to be charged, the names of the purchasers, terms of the sale which includes the consideration, and the description of the property. In this case we should not be held to the same de-

gree of proof as would be necessary in a suit of specific performance based upon said memoranda. We could only be expected to prove such memoranda in general terms, for it would be impossible at this late date to prove the exact terms of a receipt written nine years ago, and which has been lost or destroyed, and which, at all times since the execution of said deed, has been of no value or importance.

But if the Court should find no memorandum sufficient to satisfy the statute of frauds, still we insist that Defendant Hall acquired a valid interest by taking over the interest of Herbert Rogers under a verbal contract of sale from Defendant Hall to Sengstacken and Smith. For the Court is bound to find under the evidence, as did the trial Court, that an honest, bona fide contract of sale was made by Agent Hall, without any sucpicion or thought that he might ever acquire any interest in the property, and that he took over his undivided one-twenty-fourth interest in furtherance, as he believed, of the best interest of his principal. Hall did not consider that he was buying the interest from himself, but considered that he and his brother were taking over the Herbert Rogers' agreement with Sengstacken and Smith. His dealings were characterized by the highest good faith. *Under the circumstances, the statute of frauds should*

*not be used as an instrument of fraud.* And this Court of equity should not permit this Appellant to unjustly and inequitably raise the statute to assist this Appellant in unconscionably recovering this property which was innocently purchased by these defendants nine years ago.

The question involved is one of conflict of interest; did Hall, in fixing the price and making the sale, consult his own interests? If he did, the sale as to him is voidable; if he did not, then the contract should stand and the Appellants should not in this suit be permitted to raise the question whether the contract was a verbal or a written one; the defense of the statute of frauds is never available in a collareral proceeding, but only in a proceeding brought directly upon a contract; this contract was completed by deed and upon the issuance of the deed, the query of whether or not the contract of sale was in writing was immaterial, and any attack thereafter upon said contract must necessarily be a collateral attack.

To permit Appellant at this time to raise the defense of the statute of frauds was never contemplated by the principles of the law of agency or by the statute itself; it is a defense foreign to the issue; the question is, not as to the form of the contract, but was the conract made by

Hall with an eye single to the interests of his principal; if so he could thereafter acquire an interest in the transaction, and if not—if Hall had any idea of self-interest when he made the contract—then the sale is voidable as to any interest thereafter acquired by him in connection with the transaction. But at this time to permit the Appellant to defeat the well-recognized principles of agency by raising statute of frauds, would make the statute an instrument of fraud, which a Court of equity should never sanction.

And also the Appellant contends that Sengstacken was not qualified to testify with reference to the contents of such receipt by reason of an insufficient search for the original. Hall stated that he gave the receipt to Sengstacken and that it was never returned to him. Sengstacken stated that he made search for the same but had been unable to locate it. Appellant states that the qualifications of Sengstacken in regard to the degree of his search was insufficient and that he was incompetent to give any testimony as to the contents there. But again Appellant is late to raise his objection. Under the authorities heretofore cited, it will be seen that the qualification of the witness in this regard is trusted to the sound discretion of the Court in view of all the circumstances, the importance of the instrument, the length of time

intervening since the execution thereof, etc. The trial Court in this case found that the witness was qualified, because in his findings he finds that the receipt was given as claimed by Hall and Sengstacken, and this decision would not be disturbed by this Court unless it could say that there had been an abuse of such discretion. But by not objecting at the time, the Appellant waived his objection and cannot now be heard to raise the same for the first time upon appeal. And the reason of the rule is the same as before, for had we been advised that Appellant had any objection to the qualification of the witness we could have further interrogated the witness and made his testimony more definite and certain.

But more than all this, the Appellant permitted us to prove the sale to Sengstacken and Smith by oral testimony, without objection. He did not plead the statute of frauds as a defense to said sale, and so, if he would take advantage of the statute, he must object, at the time of trial, to the proof of the sale by oral testimony, and if the sale is proved by oral testitmony to the satisfaction of the Court, without objection from Appellant, then the Court must find that a sale was made. This is the rule adopted by the Courts in proving contracts which might be within the statute of frauds, and we can cer-

tainly be held to no greater degree of proof in this case than we would be in case we were suing upon the contract in question. But in addition to the note and the receipt the Defendant Hall, on August 30, 1905, as attorney in fact for the Appellant and his wife, executed a deed in consummation of said sale, setting out the purchase price, the description of the land, the consideration and named the Title Guarantee & Abstract Company as Trustee. Under the authority of Flegel vs. Dowling above cited, oral testimony is before the Court connecting the note, the receipt and the deed, and any deficincies in one may be explained from the other, for as shown by parol these instruments are all connected with the same transaction and the same negotiations. And upon this deed John Hall accepted eleven-twelfths of the consideration before it was suggested to him that he take the one-twentyfourth interest in the property. The grantee in the deed was the Title Guarantee & Abstract Company, Trustee, and it has always been competent to show by parol the beneficiaries under a grantee of this character.

So the first question for the Court to decide in this case is, was the sale so far consummated at the time Hall took his interest that it could have been enforced against his principals? His authority to make the sale is unquestioned, and

his power of attorney is here in evidence. And not only the note, the receipt and the deed with part payment thereon, but also we have the letter signed by John Hall, of date August 12th, 1905, in which he states: "The Holcomb claim, I guess is sold. Parties agreed to take the same and the abstract is now being made and unless the parties go back on the bargain, we will be able to close the deal about the 1st of September." And this, by oral testimony, is shown to refer to one and the same deal or transaction. If this sale, on August 30th, 1905, could have been enforced against the Appellant and his wife, then we are squarely within the rule laid down in the case of Robertson vs. Chapman; in which case there would be no other or further question for this Court to consider. That there was such a sale is found by the trial Court: (T., p. 80.) "Here the sale was virtually made by Hall to Sengstacken and Smith in May, 1905. At that time it is admitted he had no interest either immediate or prospective in the property and no idea that he would ever acquire one. His duty to his principal ceased at the time of the contract with Sengstacken and Smith, as far as the fact of the sale was concerned. Thereafter there was no conflict between his duty to his principal and self interest in that regard. His subsequent taking title to an undivided one-

twenty-fourth was, to all intents and purposes, a purchase from Sengstacken and Smith or Herbert Rogers, and not from himself as agent of Mrs. Herrmann. The fact that the deed had not been formally acknowledged and delivered at the time cannot change the effect of the transaction, or, in my judgment, bring it within the rule prohibiting an agent from buying from himself, nor the evil to be prevented thereby."

This Court is bound by the facts as above found by the trial Court and it will be noted that the title to the property at the time of the taking of the interest by Hall was in exactly the same condition as was the title in the Robertson vs. Chapman case. In the last mentioned case the legal title had not been passed to O'Donohoe, the deed therefor was in the hands of the agent awaiting the completion of payments by O'Donohoe. So in this case, the deed had been signed and executed by Hall under his power of attorney from his principals, and was being held by him awaiting the payment of the balance of the purchase price.

From every viewpoint we are squarely within the Robertson vs. Chapman case and entitled to the application of the law in that case. Inasmuch as we regard the law of the case well settled we have set out the evidence of this case, in the statement of the case, and particularly

called the Court's attention thereto, for we believe that this case will turn upon the consideration of the evidence rather than a consideration of the law, for we believe that the law is well settled.

## OREGON RULE.

While we rely upon the rule as laid down by the United States Supreme Court in the abovementioned case, the Supreme Court of the State of Oregon has laid down a less stringent rule. In the case of Marquam vs. Ross, 47th Oregon, 404-405, the Court has laid down this proposition: if the purchase was made by the agent or trustee at a time when there was no conflict of interest between the agent or trustee and the principal or beneficiary, then the sale or purchase should be upheld, and the Court says, after citing many cases pro and con:

> "But it is unnecessary at this time for us to examine the adjudged cases, or attempt to deduce any general rule from them, if, indeed, it is possible to do so. It will probably be found on investigation that the decision in each case depends upon the application of the general rule of disqualification to the particular facts, and that, where there was a conflict between duty and self-interest, the purchase was held void-

able, regardless of the manner in which or by whom the sale was made, and where there was no such conflict, it was upheld.

The decision of the case in hand depends upon the construction of the contract between the plaintiff and the Title Company, and the relation which the parties sustained to each other by reason thereof. When we have arrived at this determination, the way is clear. If it was such that there was a conflict between duty to the plaintiff and self interest of the Title Company at the time the sale under the foreclosure decree, the plaintiff must prevail; otherwise, his suit fails on this branch of the case."

And we are squarely within the rule as laid down by the Oregon Court, for at the time John Hall took his undivided one-twenty-fourth interest he had sold the property to Sengstacken and Smith and had charged himself in his account with these principals to the extent of the one-half payments, telling Sengstacken that he would hold him for the balance in case he should decide not to take it. And Hall's testimony shows that he finally took the interest in order to close the matter up promptly, without delay, and not with the idea of gaining any profit out of the matter. His testimony conclusively shows that he believed he was act-

ing conscientiously and to the best interest of his principal, when he took over from Sengstacken and Smith the one-twenty-fourth interest; that he considered that he was buying his interest from Sengstacken and Smith is conclusively shown by the fact that he credited the entire payment and charged Sengstacken with it before he decided to take any interest.

## Effect of Transaction on Interests of Smith, Sengstacken, Rogers, Clinkenbeard, Rood and J. T. Hall.

If the Court sustains our contention that Hall properly secured his interest in the property, then it will not be necessary to consider this phase of the case. But if the Court should conclude that the sale of the one-twenty-fourth interest to John F. Hall should be set aside, then the Appellant should recover that interest, for Sengstacken has acquired this interest of Hall with knowledge of all the facts now before the Court.

The Appellant contends that the sale should be set aside as to all the original purchasers on the theory that they were co-purchasers with Hall and that his constructive fraud tainted the whole transaction.

For the purpose of argument we will admit

that if Hall had agreed from the beginning of the negotiations to take a *joint* interest with the other purchasers and they had knowledge of that fact, then and in that event, the sale could be set aside in its entirety. That is the rule of law laid down in the cases cited by Appellant and is a most salutary principle.

But the facts of this case differ from the facts of every other case cited by Appellant. These defendants were not co-purchasers from the beginning of the negotiations, nor were they *joint* purchasers at any stage of the transaction. When Rogers, Clinkenbeard, Rood and Smtih agreed to take their respective interests and paid their purchase prices respectively, there was no suggestion, suspicion or intimation that Hall was a purchaser with them. Appellant recognizes this fact and seeks to avoid the effect of the same by saying that Sengstacken was their agent and that notice to him was notice to them. But this would be true only if Sengstacken gained this information while acting within the scope of his agency. What was the nature of the relation of Sengstacken to these parties, was he their agent in buying their respective interests in the property? If so, then notice to him would be notice to them on this point. But such is not the case. Each had bought and paid for his interest and whatever notice came to

Sengstacken, came to him after their respective deals were closed, after they had paid their money and returned to their homes. Their status as innocent purchasers was fixed when they completed their purchase and any information gained after they had once become innocent purchasers could not affect that status.

Not only was Sengstacken not their agent in making their purchases, but on the contrary, he was opposed to them in interest; he was selling *to them,* not buying *for them.*

Nor was Sengstacken nor Hall a partner with these parties for they were not buying the property jointly or as an association. Each was buying a several interest which thereafter he sold and transferred without reference to the others.

So long as the profits to be realized were not mutual, there is no reason for the rule that the setting aside of the Hall interest should also cause the setting aside of the other interests. They were at most co-tenants of an equitable interest. Sengstacken sold the one-twelfth interest of Herbert Rogers to Agent Hall and his brother, J. T. Hall, each to hold an undivided one-twenty-fourth interest. Suppose that Clinkenbeard had sold *his* interest to Hall without the knowledge of the other parties, would Appellant contend that by reason thereof the title of the other purchasers would have been inval-

idated? Certainly not! The Court should remember that the interest of each was a several one to be disposed of as the owner saw fit without reference to the others, and that in any event, there was no actual fraud in the case.

In the absence of actual fraud constructive fraud could only extend where there was notice *and where the ownership was joint.*

Suppose that the principal had owned a block of twelve lots and had authorized the agent to sell the whole block and the agent had honestly sold all of the lots in this block to several purchasers, except the last one, and without notice to the others, the agent had purchased this last lot, would appellant contend that the purchase by the agent of this last lot would avoid the other sales?

And taking the supposition farther, suppose that each of the other purchasers knew after purchase, that the agent was buying the last lot, would that affect their purchase? Most certainly not; for the purchasers became innocent purchasers at the time of their purchase.

Or assuming still further, suppose that the purchasers knew from the beginning that the agent was to buy one lot, then so long as the purchase of each was made in good faith he would be protected therein; and the distinction is that the purchasers were several purchasers—they

were not co-purchasers within the meaning of the decisions cited by appellant.

Either these several interests were purchased from Sengstacken and Smith, if their contract was enforcible, or, if not, then these several interests were purchased from the principal through the agency of Hall.

If the former proposition is true then no part of the property can be recovered and we are entitled to judgment.

Or if the latter proposition be true and the purchase of each was from the principal through the agent, then the sale should be set aside as to the one-twenty-fourth interest acquired by Hall. But as to Clinkenbeard, Rogers, Smith and Rood the sale should be upheld, for these parties purchased without any notice whatever as to the acquisition by Hall of his interest. As to the Sengstacken interest it was acquired and paid for before Hall decided to take any interest and we claim for him the benefit of an innocent purchaser. This leaves only the one-twenty-fourth interest of J. T. Hall which was acquired by him with knowledge that agent Hall was likewise acquiring a similar interest; and as to the interest of J. T. Hall we claim that the sale should not be set aside for the reason that the same was not a *joint* purchase with agent Hall, but he was a several own-

er and that the rule of constructive fraud only extends to a joint purchaser with the agent. Of course, if there was any connivance, conspiracy or fraud, the rule would be different, but in the absence of such fraud we contend that any person may make a several purchase from the principal through the agent so long as he does not join with the agent in a joint transaction, even though he may have notice of a similar purchase by the agent.

The fact that this transaction was made under one deed and the that these parties were sold equitable interests instead of legal titles, cannot change the reason of the rule. Equity will regard the substance rather than the form of the transaction. And so long as the agent acted in the interest of his principal we claim he could sell an undivided equitable interest to Tom, Dick or Harry, and the fact that he may have taken an interest himself will not invalidate the sale as to them so long as the interests are several and the profits therefrom are not necessarily mutual. The rule preventing such a sale is a rule of agency law and has no application between the principal and third parties who are not *joint* purchasers with the agent.

Another equitable principle should here be applied. Each of the purchasers, as the evidence shows, was acting entirely in good faith; the

conscience of each was clear; no suspicion of unfairness lurked in his mind; why should any of said purchasers presume or suspect that Hall was concealing or intended to conceal his purchase? Equity would seem to demand that if any person should bear the damage of Hall's agency, it should be his principal, and not an unsuspecting public. The principal had appointed Hall as her agent and held him out to the world as such; he sold her land to these defendants who purchased the same in absolutely the best of faith; now if he was false to his trust, in failing to report to his principal the fact of his purchase, who should now suffer—the innocent purchasers who had no reason to even suspicion said Hall but believed him to be acting in the best of faith, or should the principal under such facts and circumstances be the sufferer? We contend that under the facts of this case the defendants Sengstacken, Smith, Rogers, Clinkenbeard and Rood are innocent purchasers; why should said defendants, when without suspicion, be called to investigate the relations existing between Hall and his principal? There was no reason why said defendant should suspect that Hall was not reporting the facts of his purchase to his principal, and if anyone should now suffer, it should not be the innocent parties.

It remains to consider the status of the interest of the defendant Z. T. Ziglin. It is undisputed that Ziglin acquired the interest of defendant D. L. Rood. D. L. Rood was an innocent purchaser and the sale to him of the undivided one-twelfth interest should be upheld. Rood then transferred to Sengstacken and Sengstacken in turn transferred to Siglin. The title of this interest was validly conveyed by the appellant and his wife to defendant Rood and any acquisition thereafter by Sengstacken, Siglin or any other person cannot change the status of the title. Even if the Court should hold that the original interest of Sengstacken should be recovered, still there is no rule of law which would require Sengstacken to give up the title to some other property which had been validly sold by the appellant and his wife to some third party and by Sengstacken purchased. Assuming, for the purpose of the argument, that the purchase by Sengstacken of his three-twelfths interest was fraudulent, still that fact would not affect the title of other property which he might purchase where the title had passed in the first instance from appellant and his wife without fraud. But the fact is, so far as defendant Siglin is concerned, that he purchased the Rood interest from Sengstacken in 1909 without any notice or knowledge whatever of the conditions

surrounding the original purchase, and by every token is an innocent purchaser of said interest (T. p. 352.) A misprint occurs in the transcript showing that Siglin purchased a 1-2 interest instead of a 1-12).

Appellant claims that inasmuch as Sengstacken and Smith have acquired eleven-twelfths of the interest in this property that for that reason appellant should recover all of their said interest on the theory that the transaction was originally fraudulent and that Sengstacken and Smith were participants in said fraud and that the interests which they have since acquired from third parties are subject to the rights and equities of the appellant therein. This contention of the appellant would be good in case there was actual fraud in the original transaction and Sengstacken and Smith had been participants therein, but that is not the case here. As we have stated above, either Sengstacken and Smith purchased this property by an enforcible contract from the appellant and his wife and thereafter re-sold to each of the other parties, in which case all titles are valid and this appellant can recover nothing, or there was no enforcible contract with Sengstacken and Smith and the sale to these several individuals was made by the appellant and his wife through defendant Hall as their agent. And if the latter is the case

then there was a several sale to each of the defendants of a several interest in the property and each of said sales was a valid and subsisting one by reason of the fact that the defendant Hall had no interest therein. Thus, if this theory is good, Sengstacken, Smith or any other one of the original purchasers could have acquired all of the interests in the property, and the only interest which the appellant could now recover would be a one-twenty-fourth interest, or the interest acquired by John F. Hall.

Much ado is also made over certain immaterial discrepancies in the two answers. The difference in the alleged date of the sale was explained by Sengstacken who said that at the time of the first answer he had not found the note of May 17th which was discovered before the second answer was drawn, and refreshed his memory as to the date and amount. The second answer is fuller in some particulars than the first and there may be some slight discrepancies between them; any differnece is due to the fact that as the attorneys prepared for trial under the first answer, they became better acquainted with all the facts and were able to draw a fuller and more intelligent answer the second time. Any statements in pleadings drawn by attorneys are entitled to but little weight when opposed to testimony of the parties on the stand subject

to cross examination.

We are here in a Court of equity and come with clean hands and clear consciences. We bought the property in question honestly and in good faith and paid the price the parties asked, and all it was worth, and the appellant by letter declared himself satisfied. Now after several years, during which the property has increased in value from an acreage basis to town-lot basis, the appellant comes before this Court of equity to set aside this eminently fair transaction and deprive innocent purchasers of their rightful properties. As the correspondence shows, this appellant sold most of his deceased wife's property, and now he wishes to raise a technicality and revest himself with the property which was fairly sold, and from which sale he has spent the proceeds. We are confident that this Court will never permit any such inequity to be perpertated, and under the facts and circumstances of this case we claim the benefit of our bona fides and ask that the appellant be strictly held to the burden of proof in law and in fact in establishing the technicalities upon which he would rely.

Respectfully submitted,

C. R. PECK,

C. A. SEHLBREDE

*Solicitors for Appellees.*

STATE OF OREGON,
} ss
COUNTY OF COOS.

I, C.R.Peck, hereby certify that I am one of the attorneys of the Appellees in the above entitled cause; that I have carefully compared the foregoing brief of Appellees with the original on file in this case, and the same is a true and correct copy of the whole thereof.

C.R.Peck

Attorney for Appellees.